

This Opinion is Not a
Precedent of the TTAB

Mailed: August 24, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board

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In re Real-Time Marketing, Ltd.

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Serial No. 88590001
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David W. Carstens of Carstens & Cahoon, LLP
for Real-Time Marketing, Ltd.

C. Scott Strickland, Trademark Examining Attorney, Law Office 122,
Kevin Mittler, Managing Attorney.

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Before Cataldo, Adlin and Larkin, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Real-Time Marketing, Ltd. seeks registration of METALHEAD, in standard characters, for “air fragrancing preparations for automobiles or vehicles” in International Class 3.¹ The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles the registered mark METAL HEAD, also in standard characters, for

¹ Application Serial No. 88590001, filed August 23, 2019 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on an alleged intent to use the mark in commerce. The application initially also included goods in Classes 6, 12, 16 and 27, but those goods were divided into child application Serial No. 88976982, and are not subject to the refusal at issue.

“non-medicated skin care preparations; skin masks,” also in International Class 3,² that it is likely to cause confusion. After the refusal became final, Applicant appealed and filed a request for reconsideration which was denied. Applicant and the Examining Attorney filed briefs.

I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each *DuPont* factor about which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

A. The Marks

The marks are virtually identical “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir.

² Registration No. 5759462, issued May 21, 2019.

2005) (quoting *DuPont*, 177 USPQ at 567). In fact, the only difference between the marks is that Registrant's includes a space between the words "metal" and "head" and Applicant's does not. This is not a meaningful distinction. See e.g. *Stockpot, Inc. v. Stock Pot Rest., Inc.*, 220 USPQ 52, 54 (TTAB 1983), *aff'd*, 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) (finding STOCKPOT and STOCK POT confusingly similar); *In re Best Western Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) (BEEFMASTER and BEEF MASTER found "practically identical").

To the contrary, the marks look the same but for the space in Registrant's mark which is absent from Applicant's, a space which is likely to be forgotten or ignored by consumers. Indeed, we must keep in mind: (1) "the fallibility of memory over a period of time;" (2) that the "average" purchaser "normally retains a general rather than a specific impression of trademarks;" and (3) that Applicant's and Registrant's marks both include METAL and HEAD in that order and nothing else. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). See also *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) ("marks must be considered in light of the fallibility of memory") (citation, internal quotation marks, and ellipsis omitted). Perhaps more importantly, the space in Registrant's mark does not change its sound at all. The cited mark sounds exactly the same as Applicant's.

Applicant contends that the marks nevertheless convey different commercial impressions, because its mark's commercial impression is "related to and/or an appreciation of heavy metal music," which "is often associated with a unique aesthetic that includes dark themes and imagery such as death, leather, skeletons, and

demons.” 7 TTABVUE 6. By contrast, according to Applicant, the cited mark “is suggestive of and imbued with a specific commercial impression of a shiny and/or illustrious head or face.” *Id.* The problem with this argument is that there is no evidence to support it. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (“Attorney argument is no substitute for evidence.”) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)); *see also In re U.S. Tsubaki, Inc.*, 109 USPQ2d 2002, 2006 (TTAB 2014) (finding that there was no proof to support the statements in the record by counsel).

Indeed, while Applicant relies on evidence that the term “metalhead” means a fan of heavy metal music, January 6, 2021 Request for Reconsideration TSDR 12-13, there is no evidence whatsoever linking Applicant’s goods or mark with heavy metal music, fans thereof, or for that matter metal or heads.

As for the cited mark, Applicant claims that Registrant’s advertisements feature “an illustration of the shiny head/face commercial impression,” 7 TTABVUE 7, specifically the following screenshot:



January 6, 2021 Request for Reconsideration TSDR 16. While the model depicted is wearing what appears to be a metal bracelet, we discern no shininess in her face or head, and Applicant has not even explained with any specificity what it means by a “shiny head/face.” There is no metallic feature on the model’s face or head.

Applicant also relies on three consumer reviews of Registrant’s goods. One is headlined “Bright and shiny” and refers to a “fresh/clean/bright/tight” face after use of the product. Two reviews use the word “shimmer” in connection with Registrant’s goods. *Id.* at 17. We do not find this evidence persuasive, because while metal may be bright or shiny, or shimmer, these reviews do not connect metal to Registrant’s goods or their effect, or to users’ or consumers’ heads or faces. In other words, while metal and faces may both be “shiny” or “illustrious,” it does not necessarily follow that Registrant’s mark conveys a shiny or illustrious head or face, nor does the cited evidence make this connection.

In any event, even if some consumers were to perceive the marks as Applicant posits due to the reviews and advertisement, and there is no evidence that any do, other consumers would encounter only the marks, unaccompanied by advertisements, reviews or other signals which Applicant contends could convey heavy metal music or shiny heads. For these consumers, who have only the marks’ appearance and sound to go on, there would be nothing, at least not in this record, to suggest that METALHEAD “has one meaning when used with” Applicant’s goods and “a second and different meaning when used with” Registrant’s goods. *In re Embiid*, 2021 USPQ2d 577 *21 (TTAB 2021). There would be no memorable difference

between the marks, because they sound exactly the same and look almost exactly the same. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d* 777 F. Appx. 516 (Fed. Cir. 2019) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). This factor not only weighs heavily in favor of finding a likelihood of confusion, but also reduces the degree of similarity between the goods required to support a finding of likelihood of confusion. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); *Time Warner Ent. Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002); and *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001).

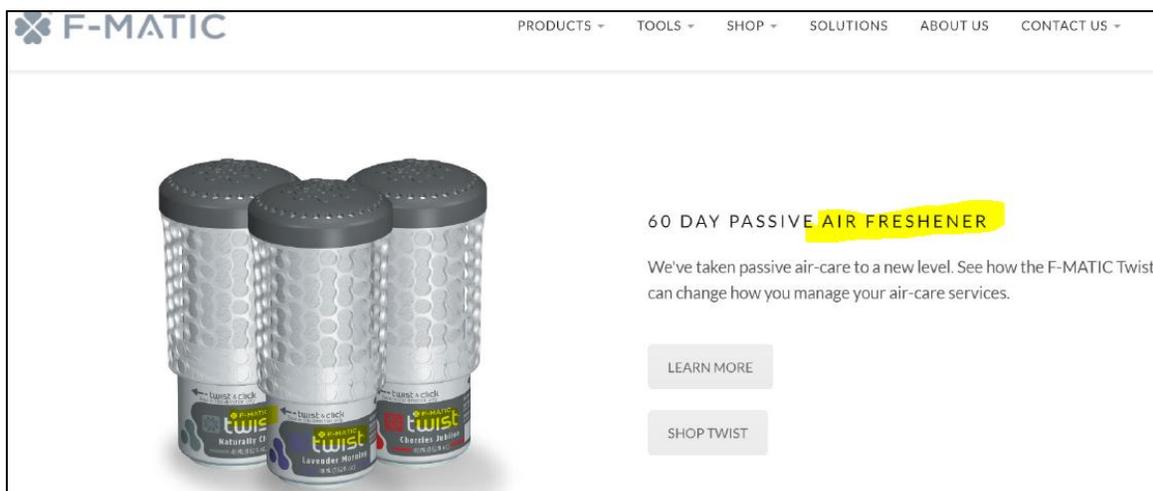
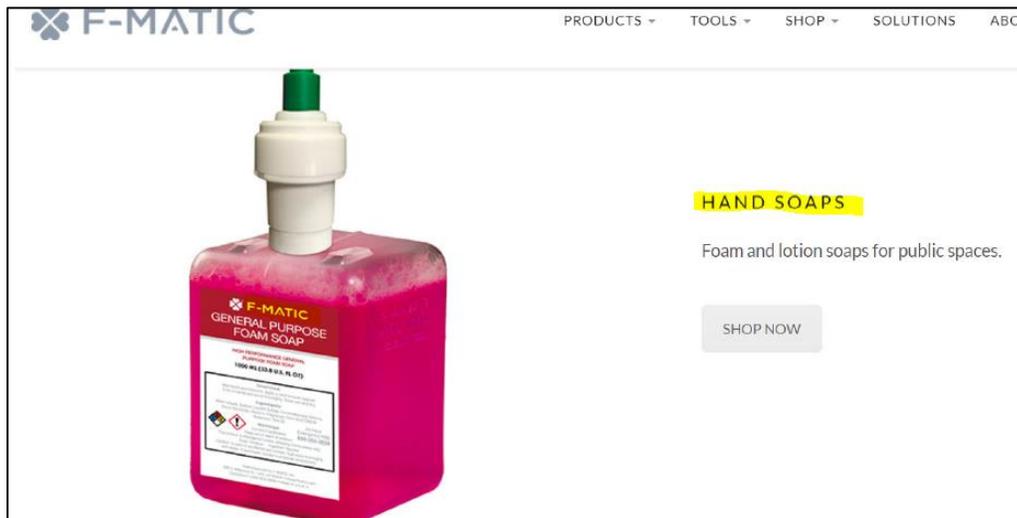
B. The Goods, Channels of Trade and Classes of Consumers

The goods need not be identical or even competitive in order to find a likelihood of confusion. Rather, the question is whether the goods are marketed in a manner that “could give rise to the mistaken belief that they emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 227 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (“Even if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods and services.”); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same

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goods can be related in the mind of the consuming public as to the origin of the goods”); *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1109 (2007).

Here, the Examining Attorney has established that goods such as those identified in the cited registration (skincare preparations) and goods such as those identified in the involved application (fragrances for vehicles) are offered under the same marks. For example, the F-MATIC mark is used for hand soaps on the one hand and air fresheners with both “Lavender Morning” and “Cherries Jubilee” fragrances on the other:

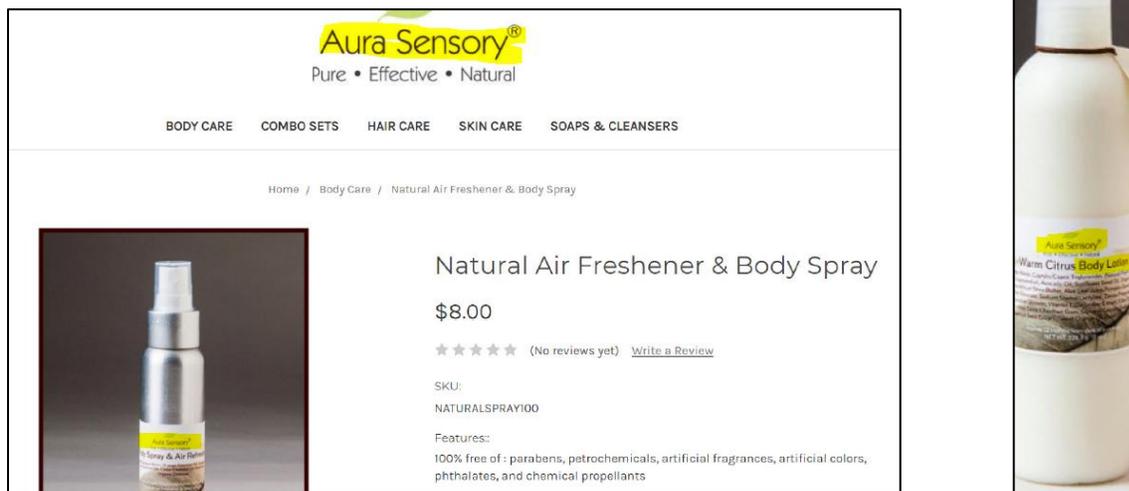


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December 6, 2019 Office Action TSDR 26, 28 (emphasis added). Bath & Body Works offers both body lotion and car fragrances under its BATH & BODY WORKS mark:



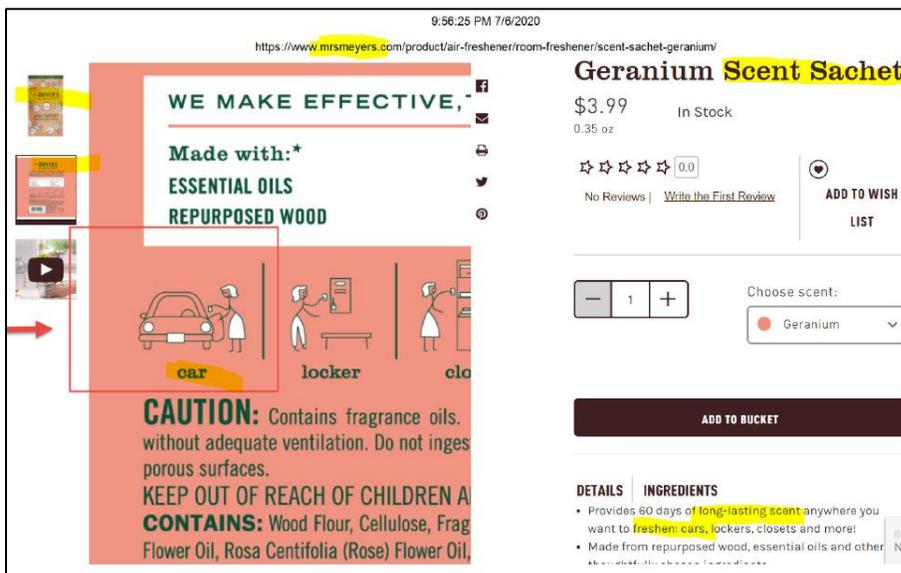
Id. at 13, 15 (emphasis added). Similarly, the mark AURA SENSORY is used for a “natural air freshener,” one promoted use of which is “to help purify and revive the stale air in your car,” as well as body lotion:



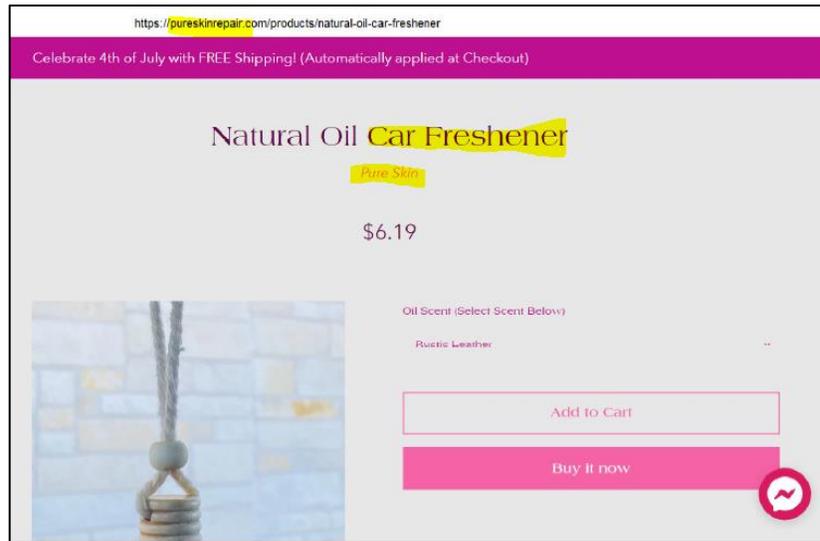
Id. at 22, 23 (“help purify and revive the stale air in your car”) and 25 (emphasis added). Aroma Works uses its TURSIOPS mark for both body lotion and fragrance sachets promoted for use in vehicles:



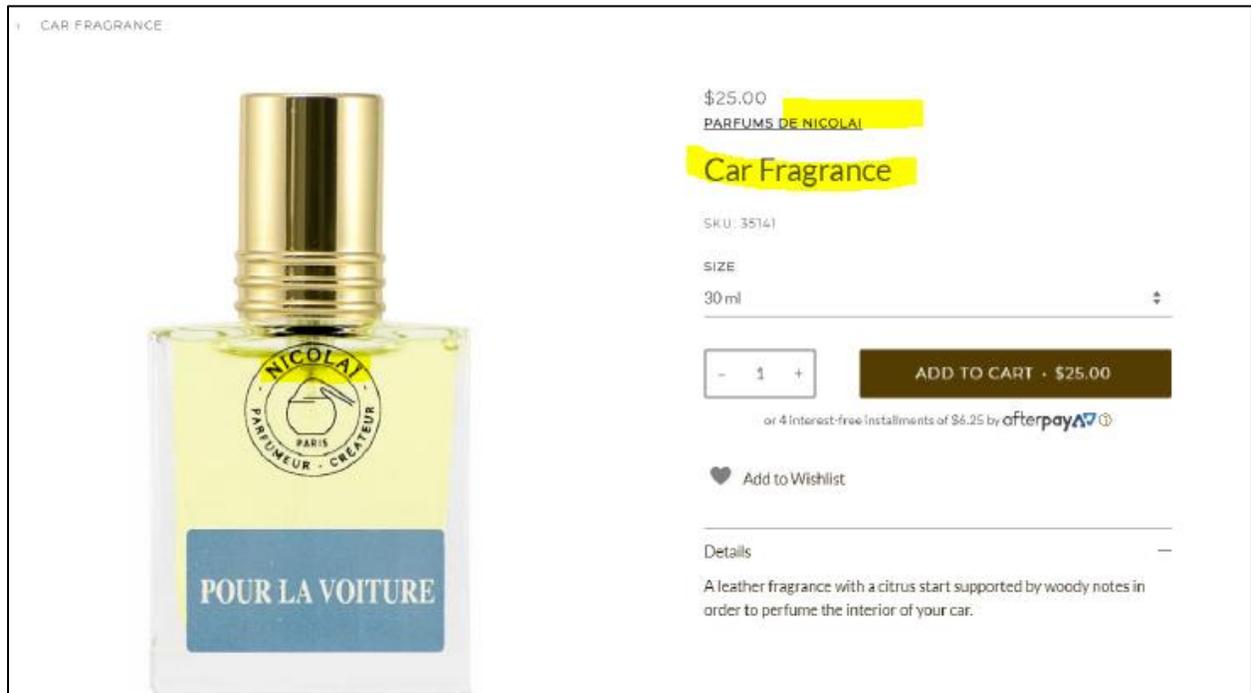
July 6, 2020 Office Action TSDR 42, 45 (emphasis added). Similarly, Mrs. Meyer’s uses its mark for both a “scent sachet” intended for use in cars and body lotion:

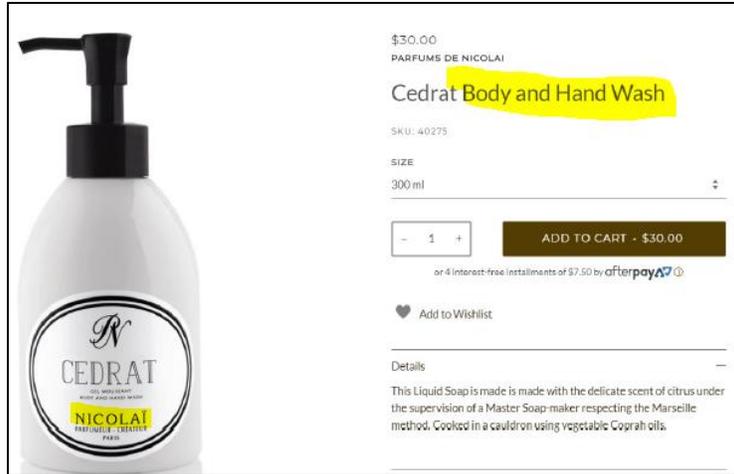


Id. at 36, 40. Pure Skin uses its mark for a healing body butter as well as a car freshener:



Id. at 27, 31. The NICOLAI mark is used for a car fragrance and hand and body wash:



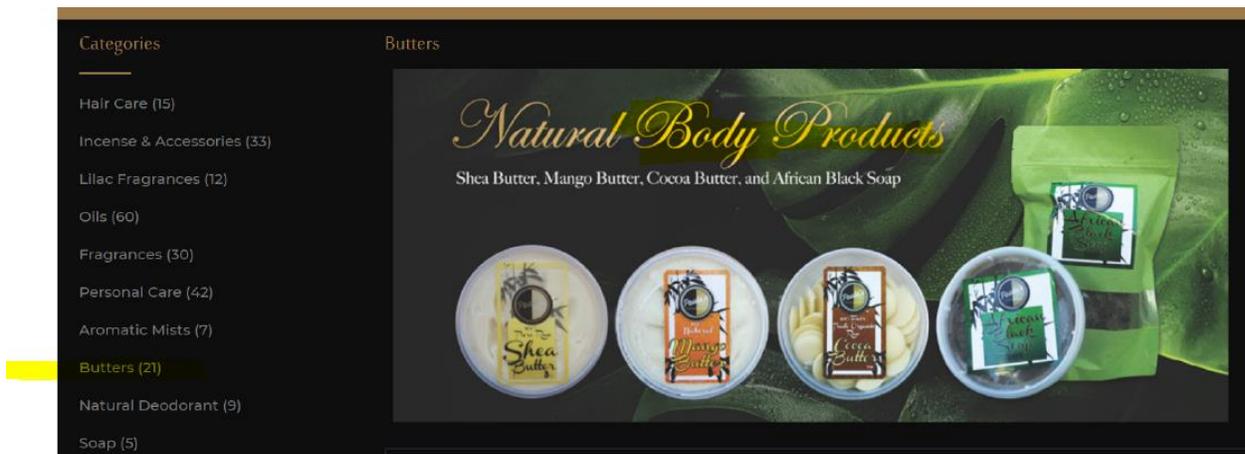
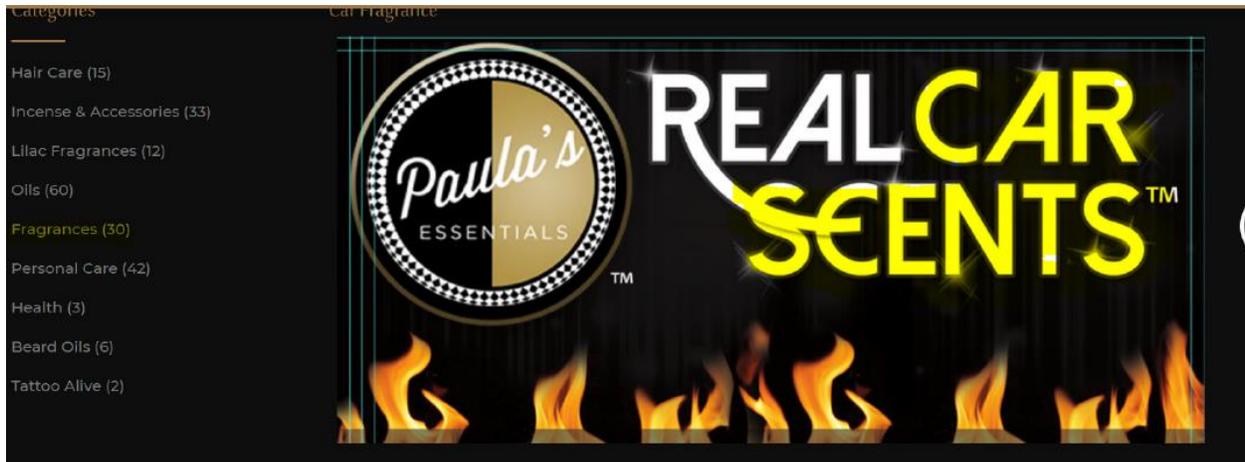


Id. at 24, 26. The mark BE IN A GOOD MOOD is used for a car vent freshener and hand and nail cream:

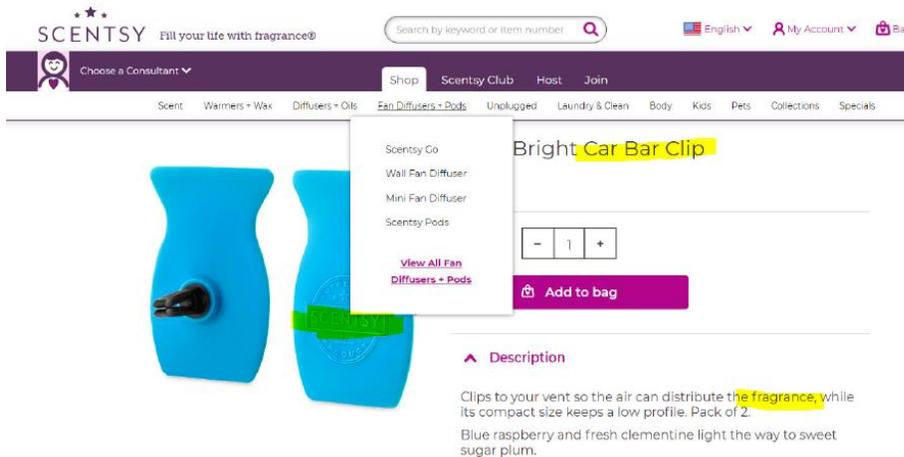


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Id. at 17, 21. The PAULA'S and PAULA HOWARD marks are used for car fragrance and body butter:



Id. at 7, 10. Scentsy offers car fragrance and body cream under its SCENTSY mark:

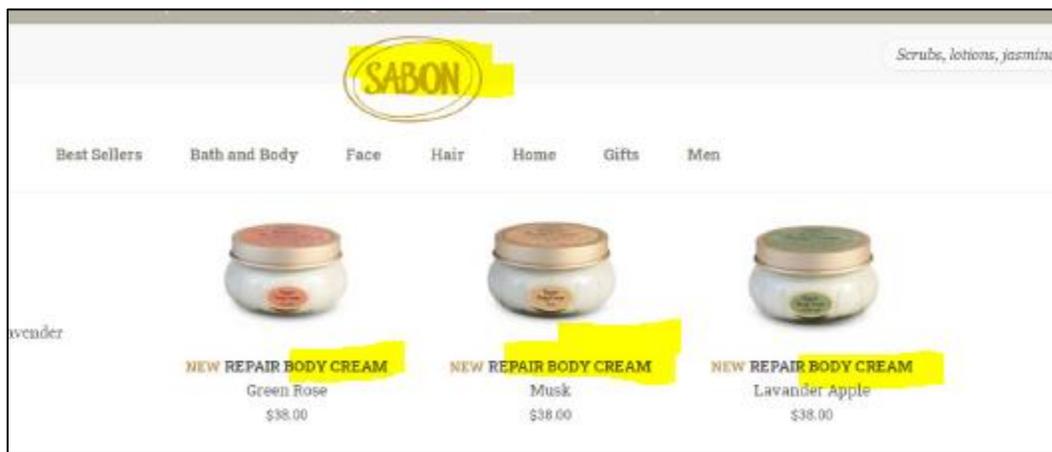
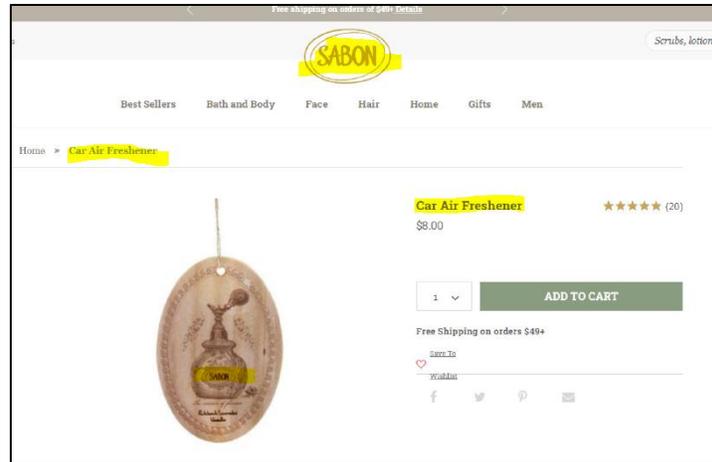


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February 1, 2021 Denial of Request for Reconsideration TSDR 48, 49. The OLIOMANNA mark is used for body cream and car and truck spray that “ZAPS stale odors”:



Id. at 44, 46. The SABON mark is used for car air fresheners and body cream:



Id. at 38, 42. The record contains a number of similar examples. *See, e.g., id.* at 10-37.

This evidence establishes that skincare products and air fragrances for vehicles are related. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (crediting relatedness evidence showing that third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”); *Hewlett-Packard Co.*, 62 USPQ2d at 1004 (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness

analysis”). Particularly given the essential identity of the marks, this factor also weighs in favor of finding a likelihood of confusion.

Moreover, this evidence shows that the channels of trade and classes of purchasers for Applicant’s and Registrant’s goods overlap. In fact, the F-Matic, Aura Sensory, Bath and Body Works, Aroma Works, Mrs. Meyer’s, Pure Skin Care, Be In a Good Mood, Paula Howard Essentials, Scentsy, Oliomanna and Sabon websites demonstrate that these companies all offer, focus on, and cater to, consumers of fragrances for vehicles on the one hand and skincare products on the other.³ Furthermore, as the Examining Attorney points out, neither Applicant’s nor Registrant’s identification of goods includes any trade channel limitations. Thus, we must presume that Applicant’s and Registrant’s goods move in all channels of trade normal therefor, which the evidence shows to be overlapping. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (“An application with ‘no restriction on trade channels’ cannot be ‘narrowed by testimony that the applicant’s use is, in fact, restricted to a particular class of purchasers.’”); *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (goods presumed to be “offered in all channels of trade which would

³ More generally, the record shows that many companies in these markets tend to focus on body care, hair care, facial care and bath and shower products, as well as perfumes, essential oils and sometimes aromatherapy.

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be normal therefor”); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). These factors also weigh in favor of finding a likelihood of confusion.⁴

II. Conclusion

The marks are so similar as to be virtually identical, the goods are related, and the channels of trade and classes of consumers overlap. Therefore, confusion is likely.

Decision: The refusal to register Applicant’s mark under Section 2(d) of the Trademark Act is affirmed.

⁴ It is not particularly relevant that Amazon offers vehicle fragrances in the “Automotive Parts & Accessories” category, and skincare products in the “Beauty and Personal Care Category.” 7 TTABVUE 11-12. The record shows that many more specialized sources that focus more specifically on personal care products also offer fragrance products, or vice versa. Similarly, it is irrelevant that Applicant’s products are “intended to be sold” under Amazon’s Automotive Parts & Accessories category. January 6, 2021 Request for Reconsideration TSDR 18-19 (Declaration of Morgan Hull ¶ 4). The question is whether these types of vehicle fragrance products are commonly offered under the same marks, and sold in the same retail outlets to the same classes of consumers, as skincare products, such that consumers would be confused as to source when they are offered under virtually identical marks, and the record reveals that they are.